No. 94-1654

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

GLEN HEISER AND GEORGE SPENCER,

Petitioners,

v.

KEEN A. UMBEHR,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the First Amendment protects independent contractors from termination or other adverse action based on the content of their speech.

2. If so, whether the *Pickering* balancing test employed in the public employment context applies to adverse actions against independent contractors.

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BRIEF IN OPPOSITION

The Respondent, Keen A. Umbehr, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the decision rendered by the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the court of appeals, Petitioners' Appendix (App.) 1a-33a, is reported at 44 F.3d 876. The decision of the court of appeals denying Petitioners' petition for rehearing and suggestion for rehearing in banc

is noted at 44 F.3d 876 and is reprinted in Petitioners' Supplemental Appendix (Supp. App.) 53a-54a. The opinion of the district court, Supp. App. 34a-52a, is reported at 840 F. Supp. 837.

Petitioners also have cited a separate action, which they incorrectly describe as a "[p]arallel proceeding[ ] in state court between the same parties," as one of the "Opinions Below." Petition for Writ of Certiorari (Petition) at 1. The cited state court action is unrelated to the matter before this Court and raises no First Amendment or other federal issues. Accordingly, it is improperly listed in the Petition. Sup. Ct. R. 14(.1)(c).

STATEMENT OF THE CASE

Respondent brought suit against the County Commission of Waubunsee County, Kansas, through its individual members, in May of 1991, alleging that the Commissioners terminated the parties' ten-year contractual relationship based solely on Respondent's public criticism of the manner in which the Commission conducted its official responsibilities. The district court granted summary judgment to Petitioners, concluding that governmental entities may, without transgressing the First Amendment, predicate the award of government contracts on the content of an individual's speech. The court of appeals reversed, finding that independent contractors are entitled to First Amendment protection from retaliation when engaging in speech on matters of public concern.

A. Statement of Facts

In 1981, Respondent bid on and obtained a contract to collect residential refuse in six rural communities within Waubunsee County Kansas. App. 2a. The contract, which was renegotiated in 1985, automatically renewed each year unless either party provided sixty (60) days notice of an intent to terminate. App. 2a-3a. After ratifying the agreement, each of the six communities had the right to opt out of the agreement on ninety (90) days notice. App. 2a. Respondent provided uninterrupted residential collection to the citizens of the County, without any complaints about the quality of his service, for a period of almost ten years.

Although Respondent was an active participant in local public affairs throughout this period, in early 1989, he initiated a series of public comments concerning county government in letters to the editor, at meetings of the County Commission, and in a weekly newspaper column that he authored for the local newspaper. In his public statements, Respondent expressed views on a wide range of issues concerning matters of keen public interest and debate including: the use of government property for the benefit of private citizens and businesses within the County; alleged mismanagement of taxpayer funds; closed-door sessions of the County Commission, which Respondent maintained were conducted in violation of the Kansas Open Meetings Act (KOMA), K.S.A. § 75-4317, *et seq.*; limitations on access to public records, in violation of the Kansas Open Records Act (KORA), K.S.A. § 45-215, *et seq.*; as well as discussions of what Respondent

perceived as abuses of power by individual County Commissioners. App. 3a-4a.

Respondent's commentary on these issues generated a series of investigations by officials at both the county and state level. The Attorney General of Kansas, for example, initiated an inquiry into the use of county equipment and labor on private projects and the improper use of taxpayer money by employees of the county road and bridge department. The investigation concluded that taxpayer funds and resources had been improperly used by county employees, that county equipment had been used on projects that exhibited only the most limited public purposes, and that loose accounting and administrative practices made it difficult to determine whether county resources were being properly employed. Appellees' Appendix 157-58 (December 29, 1989, opinion of the Attorney General).[1]

A second investigation by the Attorney General regarding the alleged violations of the state open meetings statute resulted in the entry of a consent decree between the State and the County Commission. Appee. App. 160-61. In the September 5, 1989 agreement, the County Commission acknowledged that it had violated the terms of the statute and agreed to abide by its provisions in the future. In addition, the consent decree required that each Commissioner receive a copy of the statute and that the

[1]Citations to Appellees' Appendix (Appee. App.) and Appellant's Appendix (Applt. App.) are to the records submitted to the court of appeals.

Commission hold an open meeting at which the County Attorney would explain the various requirements of the act. *Id.*

Respondent's public criticism of the Commission's policies engendered increasing resentment and hostility from the Commissioners. At one point, the County Commission summoned the editor of the local newspaper to a private meeting to discuss the Commissioners' concerns about the content of the articles the paper was printing. Appee. App. 154. During the public portion of the Commission's meeting, Petitioner Heiser suggested that the paper, which received significant revenue from its designation as the official County newspaper, should "take a second look at what is put in the paper, to avoid anyone getting in trouble." Applt. App. 92. He also advised the paper's management that the articles "should be censored" to ensure that they were "truthful." *Id.* In a front page story appearing shortly thereafter, the editor of the newspaper recounted the exchange and noted that he had never before, in thirty-eight years of publishing, been threatened in this manner. Appee. App. 154.[2]

In February of 1990, the County Commission, without articulating any basis for its decision, voted to terminate Respondent's contract. App. 4a; Appee. App. 164 (minutes of February 5, 1990 meeting). The

[2]During a separate meeting, Respondent asked for permission to address the Commission. Petitioner Spencer asked Respondent, a constituent, whether he was prepared to "get down on [his] knees and beg" for permission to address an elected body during a public meeting. Applt. App. 81.

Commission, however, failed to cite the applicable agreement in its notice of termination and the contract continued pursuant to its terms for another year. App. 4a.

Throughout the course of the ensuing eleven months, Respondent continued to speak out on various local political issues in addition to mounting an unsuccessful campaign for county office. The following year, in January of 1991, the Commission properly exercised the contractual termination provision and revoked the decade-long business relationship between the parties. As a consequence, the contract expired on April 7, 1991. App. 4a.

Following termination of the contract, Respondent submitted individual bids to each of the municipalities formerly covered by the county-wide agreement. Although he was able to obtain contracts with five of the towns, Respondent lost roughly 17 percent of his revenue when one of the cities previously covered by the agreement with the County elected to contract with a different collection service. App. 4a-5a.[3]

B. Proceedings Below

In May of 1991, Respondent filed suit under 42 U.S.C. § 1983 in the United States District Court for the

[3]Petitioners puzzlingly refer to the contractual relationship as "a monopoly." Petition at 10. Petitioners apparently confuse an exclusive contract, in which the parties mutually agree that they will not contract with others for a set period, with a monopoly, in which the supplier has the power to control prices and exclude competition.

District of Kansas against Petitioners in their official and individual capacities and against one of the County Commissioners who had since left office in his individual capacity. Respondent maintained that his contract with Waubunsee County had been terminated in direct retaliation for his public criticisms of the County Commission in violation of his rights under the First and Fourteenth Amendments to the United States Constitution.

On December 30, 1993, the district court granted the County Commissioners' motion for summary judgment. In its decision, the court explicitly assumed that Respondent's allegations were true and that his comments on matters of public importance motivated the County's decision to terminate his contract. Supp. App. 40a. The court further presumed that if plaintiff had been a public employee, the First Amendment would have protected him from any adverse action based upon application of the test established by this Court in *Pickering v. Board of Education*, 391 U.S. 563 (1968). Supp. App. 40a. Despite these assumptions, the district court held that "the First Amendment does not prohibit defendants from considering plaintiff's expression as a factor in deciding not to continue with the trash hauling contract at the end of the contract's annual term." Supp. App. 41a.

On appeal, a unanimous panel of the United States Court of Appeals for the Tenth Circuit reversed the district court's judgment. The court concluded that independent contractors are entitled to First Amendment protection for speech on matters of public concern and that

governmental entities may not use their economic relationships as leverage to suppress public criticism of their actions. App. 29a-30a. In reaching this result, the court found that a series of cases from other courts rejecting challenges to the distribution of public contracts based on party affiliation had limited application to cases involving retaliation against independent contractors for speech on matters of public concern. App. 29a.

Relying principally on *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), the panel also rejected the contention that there is a difference of constitutional magnitude between the loss occasioned by termination of public employment and the loss suffered by denial or termination of a public contract. App. 25a-29a. As the court observed, governmental efforts to suppress public dialogue and debate "'can be just as effective and offensive when the state reduces a citizen's income by twenty percent as when the state reduces the citizen's income by one hundred percent.'" App. 28a-29a (quoting *Horn v. Kean*, 796 F.2d 668, 683 (3d Cir. 1986) (in banc) (Gibbons, C.J., dissenting)). Based on its findings, the court of appeals reversed the judgment of the district court and remanded for trial.[4]

Petitioners then filed a petition for rehearing and a suggestion for rehearing in banc pursuant to Federal Rule of Appellate Procedure 35(b). On February 10, 1995, the

[4]In light of what it perceived as conflicting authority in other circuits, however, the court of appeals affirmed the district court's grant of qualified immunity to Petitioners in their individual capacities. App. 31a.

panel rejected the petition for rehearing, and, at the same time, "[n]o member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc," the court of appeals denied Petitioners' suggestion of in banc consideration. Supp. App. 53a-54a.

REASONS FOR DENYING THE WRIT

I.

THE COURTS OF APPEALS HAVE CONSISTENTLY CONCLUDED THAT THE FIRST AMENDMENT FORBIDS RETALIATION AGAINST INDEPENDENT CONTRACTORS BASED ON THEIR SPEECH

For nearly 30 years, this Court has drawn clear lines of demarcation in the public employment context between the appropriate First Amendment analysis to be employed in actions involving political affiliation or patronage and those involving retaliation for speech. *Compare Rutan v. Republican Party of Illinois*, 497 U.S. 72 (1990); *Branti v. Finkel*, 445 U.S. 507 (1980); and *Elrod v. Burns*, 427 U.S. 347 (1976) *with United States v. National Treasury Employees Union*, 115 S. Ct. 1003 (1995); *Waters v. Churchill*, 114 S. Ct. 1878 (1994); *Rankin v. Mcpherson*, 483 U.S. 378 (1987); *Connick v. Myers*, 461 U.S. 138 (1982); and *Pickering v. Board of Education*, 391 U.S. 563 (1968). Although both *Elrod* and *Pickering* stand for the general "proposition that a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a

condition of public employment," *Abood v. Detroit Board of Education*, 431 U.S. 209, 234 (1977), the Court has adopted fundamentally different modes of analysis in each setting.

When an employee maintains that an adverse action has been taken based on affiliation with a particular political party, for example, the government must demonstrate that the "patronage practices are narrowly tailored to further vital government interests . . . ." *Rutan*, 497 U.S. at 74. Based on the coercive effects of patronage policies on public employees' political beliefs and associational interests, the Court has held that any perceived governmental interest in allocating positions based on party affiliation is "adequately served by choosing or dismissing certain high-level employees on the basis of their political views." *Id.* *See also Branti*, 445 U.S. at 517.

In actions involving alleged retaliation for speech, in contrast, the test is quite different. Although this Court has emphasized that the judiciary must "ensure that citizens are not deprived of fundamental rights by virtue of working for the government," *Connick*, 461 U.S. at 147, it has also recognized that the government has rights as an employer that it does not possess with regard to the citizenry at large. *Waters*, 114 S. Ct. at 1886. Accordingly, while private citizens may obtain First Amendment protection even for speech that does not touch on major issues of the day, the First Amendment protects the speech of public employees only if it involves matters of public concern. *Id.* Moreover, having established that

the speech involves matters of public interest, a court must still find that the employee's interest in participating in public debate outweighs the State's interest "as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568.

In an effort to portray the decision of the court of appeals as aberrational, Petitioners conflate these two distinct lines of analysis and compare cases in which independent contractors sought protection from patrongage practices under *Elrod* and *Branti* with cases in which courts applied *Pickering* and its progeny to independent contractors' allegations of retaliation based on speech. Petition at 16-18. The courts of appeals, however, in keeping with the distinctions drawn by this Court in the public employment context, have developed two separate lines of authority regarding the First Amendment rights of independent contractors.

In cases such as this involving allegations that the government has used a contractual relationship to punish speech with which it disagrees, the courts of appeals, almost without exception, have readily acknowledged that independent contractors and others in non-employment relationships with the government are entitled to First Amendment protection from retaliation based on the content of their speech. In addition to the decision of the Tenth Circuit in this case, App. 30a, and in *Abercrombie v. City of Catoosa*, 896 F.2d 1228 (10th Cir. 1990), three other circuits have determined that independent contractors and other non-employees are protected by the First

Amendment from retaliatory actions premised on their public criticism of government officials.

In *North Mississippi Communication v. Jones*, 792 F.2d 1330 (5th Cir. 1986), the Fifth Circuit held that the First Amendment prohibited local officials from removing the official county designation from a newspaper on the basis of its critical comments about the county government. *Id.* at 1337. Because such economic reprisals would permit governmental entities to accomplish indirectly a result they could never accomplish directly -- the economic punishment of expression -- the Fifth Circuit determined that the county's refusal to advertise in the newspaper based on its outspoken opposition to various governmental policies constituted a violation of the First Amendment. *Id. See also Copsey v. Swearingen*, 36 F.3d 1336, 1346 (5th Cir. 1994) (applying *Pickering* test to speech of contractor providing vending services in state capitol building).

In a more recent decision, the Fifth Circuit found that a tow truck operator who alleged that he had been removed from a police referral list for stranded motorists based on a complaint he lodged with the sheriff stated a claim under the First Amendment. *Blackburn v. City of Marshall*, 42 F.3d 925 (5th Cir. 1995). More significantly, because the plaintiff had neither an employment relationship with the government nor a relationship resembling an employment situation, the court concluded that the government could demonstrate no interest in restricting speech and thus the plaintiff need not meet the test established in *Pickering*, but instead need

only demonstrate that the government had deprived him of a valuable benefit in retaliation for his speech. *Id.* at 934.

Two other circuits have similarly concluded that the First Amendment's free speech protections extend to individuals who, while not in an employment relationship, are engaged in some form of contractual arrangement with the government. In *Havekost v. U.S. Dep't of Navy*, 925 F.2d 316 (9th Cir. 1991), the Ninth Circuit concluded that the *Pickering* test provided an appropriate mechanism for assessing First Amendment claims pursued by an individual who had a license to provide bagging services at a Navy Commissary. *Id.* at 318-19. Likewise, the Eighth Circuit in *Smith v. Cleburne County Hospital*, 870 F.2d 1375 (8th Cir. 1989), applied the *Pickering* test to the allegations of a doctor who served as an independent contractor at a county hospital. *Id.* at 1381-82. As a result, Petitioners' contention that the decision of the Tenth Circuit "is inconsistent with the conclusion reached by each of the other circuits," Petition at 15, is simply inaccurate.

The only circuit to take a contrary view is the Seventh Circuit. In *Downtown Auto Parks v. City of Milwaukee*, 938 F.2d 705 (7th Cir.), *cert. denied*, 112 S. Ct. 640 (1991), the court, in a footnote, uncritically extended its previous conclusion that independent contractors are not shielded from patronage practices under the rationale of *Elrod* and *Branti* to an action involving retaliation for speech. *Id.* at 709 n.5. The opinion, however, fails to analyze or discuss the significant differences between the government's interest

in considering party affiliation in contracting situations and its interest, or lack thereof, in using its contractual relations in a retaliatory manner to punish those who express dissenting viewpoints.

In the district court, Petitioners properly characterized the Seventh Circuit's holding in this manner: "Although the term was not used, the only conclusion one can draw is that this is a type of exempt or privileged retaliation." Appee. App. at 656. With all due respect, there is no room within the confines of the First Amendment for a governmental "privilege to retaliate" -- a privilege that would allow government officials to impose what is in essence an economic fine on those who question the wisdom and propriety of their actions.

While a number of courts in addition to the Seventh Circuit have refused to extend the rationale of *Elrod* and *Branti* to independent contractors and have instead held that governmental entities may legitimately disburse government contracts based on party affiliation, App. 11a-14a (citing cases), the court of appeals in this case properly concluded that cases addressing patronage practices are of "limited relevance to whether independent contractors should be protected against retaliation for speech on matters of public concern." App. 29a. This Court has consistently differentiated between actions involving patronage practices and those involving infringements on speech, *supra* at 9, and the balancing test it has adopted varies markedly depending on whether the government's employment decision is based on party affiliation or consideration of an employee's speech.

None of the interests advanced in the patronage cases -- ranging from the historical roots of the practice, to promotion of the two-party system, motivation of political participation, and improved political accountability[5] -- is served where, as here, the government retaliates against an individual for his speech. Whatever merit these principles have in the patronage context, they provide no support for the contention that governmental entities are immune from liability when they attempt to punish independent contractors for exercising their right to discuss matters of public concern.

On the contrary, the only interest this Court has recognized in the speech context is the government's interest as employer in preventing disruptions of the workplace and ensuring proper administration of the programs in which the individual is employed. *Waters*, 114 S. Ct. at 1886-87. A blanket rule, such as that advanced by Petitioners, denying independent contractors First Amendment protection even for core political speech permits the suppression of ideas by governmental entities without requiring the government to demonstrate *any* corresponding interest in restricting speech. As Justice Powell, dissenting in *Branti*, recognized, even if patronage dismissals of public employees were constitutionally permissible, employees would still be entitled to First

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[5] *See, e.g., Rutan*, 497 U.S. at 93-96 (Scalia, J., dissenting) (patronage has ancient roots in the Republic and provides party discipline that may improve government efficiency); *Branti*, 445 U.S. at 527-31 (Powell, J., dissenting) (patronage strengthens political parties, motivates citizen participation, and promotes accountability); *Elrod*, 427 U.S. at 379 (Powell, J., dissenting) (same).

Amendment protection from retaliation based on speech because "*no substantial state interest justifie[s] the infringement on speech.*" *Branti*, 445 U.S. at 527 (Powell, J., dissenting) (emphasis added) (citing *Perry v. Sinderman*, 408 U.S. 593 (1972)). The fact that some courts have determined that the First Amendment does not protect independent contractors from adverse actions based on political affiliation, therefore, provides no support for Petitioners' sweeping contention that independent contractors enjoy no First Amendment rights whatsoever.

Two decisions from the Eighth Circuit fully demonstrate the distinction between the two lines of authority. In one case, *Sweeney v. Bond*, 669 F.2d 542 (8th Cir. 1982), the court declined to extend *Elrod* and *Branti* to provide independent contractors with protection from termination based on their political affiliation. In the other, *Smith*, 870 F.2d at 1381, the same court found that independent contractors are entitled to protection from retaliation for speech on matters of public concern under *Pickering*. Although Petitioners suggest that the Eighth Circuit has "reach[ed] inconsistent conclusions concerning the rights of independent contractors under the First Amendment," Petition at 16, the decisions reflect not conflicting rulings, but the application of two distinct legal doctrines.

The decision of the court of appeals in this case is only the most recent in a line of appellate decisions finding that governmental entities may not, consistent with the First Amendment, utilize their business relationships with independent contractors to exert a form of economic

coercion over the exercise of the fundamental right to engage in political discourse. Based on the relative consistency of these precedents and the lack of any reasoned analysis by the only Circuit to adopt a contrary approach, this Court's review of the decision rendered by the United States Court of Appeals for the Tenth Circuit is unnecessary.

II.

THE COURT OF APPEALS CORRECTLY DECIDED THE ISSUE PRESENTED

Aside from citing each of the decisions involving the First Amendment rights of independent contractors and asserting, inaccurately, that "there does not appear to be a majority view among the Circuits, but only fragmented and mutually inconsistent analysis and conclusions," Petition at 15, Petitioners make little effort to articulate any coherent rationale for questioning the Tenth Circuit's finding that independent contractors, like all citizens, are entitled to engage in speech on matters of public concern without fear of reprisal from government officials. Indeed, one of Petitioners' only substantive critiques of the decision is that it "impose[s] on local units of government the obligation to avoid economic injury to government contractors whose statements on issues of public concern may have irritated public administrators," Petition at 4, -- a broadside that, if anything, supports rather than questions the validity of the judgment.

Petitioners also contend that the decision, by merely creating the potential for First Amendment liability, imposes an unnecessary burden on *government officials*. Petition at 21. To alleviate any concern these officials may have about potentially meritless actions, Petitioners advance a rule of First Amendment jurisprudence that would preclude not only insubstantial claims of retaliation, but any claim brought by an independent contractor alleging retaliation for speech, even those in which the contractor has clearly been terminated for voicing disagreement with those in power. In essence, Petitioners maintain that the administrative cost of determining whether government officials were motivated solely by personal animus or by legitimate, non-retaliatory considerations is too high a price to pay to protect First Amendment freedoms.[6]

This extraordinary assertion -- that core First Amendment values should be sacrificed to a rule of administrative expediency -- finds no support in this Court's precedents and runs counter to the Court's recognition that the First Amendment reflects a "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open." *New*

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[6]It is important to recall that the district court and court of appeals expressly assumed that Petitioners terminated Respondent's contract in response to his critical comments on matters of public concern. App. 5a-6a. Moreover, Petitioners protestations about the burdens imposed by meritless claims of retaliation are peculiar in the context of this case where there is little dispute that the termination was retaliatory. In any event, the need for and scope of any prophylactic rules may be more appropriately addressed after a final judgment is entered and the factual record has been fully developed.

York Times v. Sullivan, 376 U.S. 254, 270 (1964). Under the peculiar calculus of interests advanced by Petitioners, the speech of independent contractors is never entitled to First Amendment protection and the government may retaliate against contractors for criticizing its policies without ever proffering an explanation for its actions. Had the court of appeals adopted this approach, an entire class of individuals who do business with state and local governments would be deprived of the right to engage in public debate on issues that are vital to our system of self-government and instead would be forced to engage in a form of self-censorship if they wish to retain their economic relationships with the government. Petitioners, therefore, have failed to demonstrate either that the court of appeals reached an inappropriate result or that the decision conflicts with rulings from this Court.

On the contrary, the Tenth Circuit's resolution of this issue is fully consistent with this Court's First Amendment precedents. Although the balancing test applied to First Amendment claims varies according to the context in which they arise, government actions which burden or infringe First Amendment freedoms can only be sustained if the government can establish some legitimate, countervailing interest in regulating speech. *Compare Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960) (government must demonstrate compelling interest for restrictions on speech) *with Central Hudson Gas & Elec. v. Pub. Serv. Comm.*, 447 U.S. 557, 563-64 (1980) (regulation of commercial speech permissible upon showing of substantial interest) *and Connick*, 461 U.S. at 151 (government, as employer, may in some

circumstances regulate speech that interferes with employment relationship). The court of appeals correctly concluded that a blanket rule denying independent contractors First Amendment protection would permit government officials to restrict speech without demonstrating any offsetting government interest. App. 29a-30a (patronage rationales cannot support restrictions on speech). For the same reason that the Court has prohibited public employers from "us[ing] their authority over employees to silence discourse, not because it hampers public functions, but because superiors disagree with the content of the employees' speech," *Rankin v. McPherson*, 483 U.S. 378, 384 (1987), government officials may not use their contractual relationships to punish speech absent some legitimate basis for believing that the comments may interfere with implementation of the contractual agreement. Accordingly, the Tenth Circuit properly rejected the suggestion that independent contractors enjoy no First Amendment protection regardless of the government's motivation for the adverse action.

The court of appeals also concluded that denying independent contractors First Amendment protection would allow government officials to regulate and control the content of public dialogue indirectly, through their economic relationships, even though the same efforts would be entirely impermissible if attempted directly. App. 23a. This Court has repeatedly held that government benefits cannot be used as a device to control speech:

> [E]ven though a person has no "right" to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests -- especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow government to "produce a result which [it] could not command directly."

Perry v. Sinderman, 408 U.S. 593, 597 (1972) (citation omitted). *See also Rutan*, 497 U.S. at 77-78. Applying this principle to the present case, the Tenth Circuit concluded that "permitting governments to terminate a public contract because of the contractor's speech [permits] government to accomplish indirectly that which they cannot accomplish directly -- punishment of speech they do not like." App. 23a.

The court of appeals' decision in this case properly resolved the issue presented by ensuring that governmental entities do not use economic coercion to silence or suppress ideas with which they disagree. The holding permits government actors to avoid liability by demonstrating either that their decisions are based on

considerations unrelated to the suppression of speech or that consideration of speech on matters of public concern is necessary to further legitimate governmental interests in the proper administration of its contractual arrangements. The decision strikes a reasonable balance, therefore, between the government's legitimate programmatic interests and the First Amendment rights of independent contractors. Accordingly, review by this Court of the decision by the United States Court of Appeals for the Tenth Circuit is not necessary to correct any legal error.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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